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Via Email and Regular Mail

San Francisco Planning Department
Attn: Sarah B. Jones
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Sarah.B.Jones@sfgov.org

RE: Little Yosemite Fish Passage Project; Preliminary Mitigated Negative Declaration, SCH #2014112049, Alameda County

I am writing on behalf of SAVE THE FROGS, a non-profit organization dedicated to the conservation of amphibians, regarding the Little Yosemite Fish Passage Project (“Project.”) As discussed more fully below, the Preliminary Mitigated Negative Declaration (“PMND”) prepared for the Project does not comply with the California Environmental Quality Act (“CEQA”), as it ignores potentially significant impacts to native amphibian species that occur in the Project area.

The evidence previously submitted by SAVE THE FROGS, as well as other commentators and state and local agencies, demonstrates the need and legal obligation on behalf of the City of San Francisco (“City”) and San Francisco Public Utility Commission (“SFPUC”) to prepare an Environmental Impact Report (“EIR”) under CEQA. In our view, the context in which this Project is being proposed – as part of a larger and deliberate objective to modify habitat in Alameda Creek to favor salmonids where none now exist at the expense of imperiled amphibian species that rely on that habitat – is ill-conceived and does not appear to have been analyzed in a meaningful way, either in this Project, or as proposed mitigation for the Calaveras Dam Replacement Project. SAVE THE FROGS therefore requests that the City withdraw this Project from further consideration until its costs and benefits can be more accurately assessed.

As discussed below, the City’s procedure in this case– presenting the public with an approved negative declaration, which the public must then *appeal* to the Planning Commission as the *only way* to contest the City’s determination that Project impacts would be insignificant – is contrary to CEQA law and must be rescinded, along with the appeal filing fee which must be refunded immediately to SAVE THE FROGS (at P.O. Box 78758, Los Angeles, CA 90016). The City should do so within the next 30 days or provide a detailed written response as to why it is not legally obligated to do so. In the absence of a timely response, SAVE THE FROGS reserves the right to consider legal avenues at its disposal to recover the fee improperly charged.

I. BACKGROUND

A. Project.

The proposed Project is located within the Sunol Regional Wilderness on property owned by the City and County of San Francisco that is leased to the East Bay Regional Park District (EBRPD). The project sponsor San Francisco Public Utilities Commission (SFPUC) proposes modifications to a 0.4 mile reach of Alameda Creek referred to as Little Yosemite ostensibly to improve upstream passage conditions for adult anadromous steelhead.

The modifications are intended to fulfill the requirements of the Biological Opinion issued by the National Marine Fisheries Service for the Calaveras Dam Replacement Project to physically modify potential impediments to adult steelhead migration in the Little Yosemite reach and facilitate a future steelhead run in Alameda Creek upstream of Little Yosemite. The proposed modifications include constructing concrete weirs shaped like natural boulders or bedrock in three strategically located water features to deepen and stabilize landing pools at the tops of waterfalls along the fish migration path.

B. Environmental Setting.

The Little Yosemite area of Alameda Creek is located approximately 2.6 miles downstream of the Alameda Creek Diversion Dam (ACDD) and the Alameda Creek Diversion Tunnel (ACDT). The stream channel in this reach is narrow and rocky, consisting of large boulders and locally dense riparian vegetation on the channel margins. Due to its bedrock base, the Little Yosemite section of Alameda Creek typically supports aquatic habitat year round, in contrast to the alluvial upstream sections which usually run dry in late spring to summer.

The project area is located within designated critical habitat for California tiger salamander, California red-legged frog, and Alameda whipsnake. The area is not considered critical habitat for steelhead as it is located well upstream of substantial barriers to anadromous fish. Surveys show that Little Yosemite is currently occupied by both Foothill-yellow legged and California red-legged frogs. In particular, the pools in this area represent a critical breeding site for Foothill yellow-legged frogs, whose natural breeding sites are limited downstream by non-native and invasive predators, (e.g. crayfish, bullfrogs, and bass) and unsuitable physical habitat (e.g. riparian encroachment into the active channel, and in the future, cold water temperatures). At present, the fast moving stream water during high flow events and the vertical relief in Little Yosemite is considered to act as a natural barrier to these invasive species, which require slow moving, and warmer water. In addition, both frog species are currently being threatened by chytrid fungus, which has been detected in Little Yosemite and in downstream populations.

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C. CEQA Compliance for Project.

To comply with CEQA, on November 20, 2014, the City Planning Department (“PD”) posted a Notice of Availability of and Intent to Adopt a Mitigated Negative Declaration, along with a Preliminary Mitigated Negative Declaration (“PMND”). The City Notice states that the “PMND documents the determination of the Planning Department that the proposed project could not have a significant adverse effect on the environment.” The Notice goes on to state that the public has three options with respect to the PMND, it may either take no action, submit comments relating to wording changes in the document, or, if a public member wishes to argue that an EIR need be prepared, appeal the PD’s determination, as follows:

Appeal the determination of no significant effect on the environment to the Planning Commission in a letter which specifies the grounds for such appeal, accompanied by a \$521 check payable to the San Francisco Planning Department. An appeal requires the Planning Commission to determine whether or not an Environmental Impact Report must be prepared based upon whether or not the proposed project could cause a substantial adverse change in the environment. ...The letter must be accompanied by a check in the amount of \$521.00 payable to the San Francisco Planning Department, and must be received by 5:00 p.m. on December 22, 2014. ... *In the absence of an appeal, the mitigated negative declaration shall be made final*, subject to necessary modifications, after 30 days from the date of publication of the PMND. (emphasis added.)

Based on this stated requirement, SAVE THE FROGS submitted an appeal, along with the \$521 fee on December 15, 2014.

Following the appeal deadline, the City proposed a series of hearing dates before the Planning Commission, on January 15, April 9, April 16, May 7, May 14 and August 6, 2015, only to subsequently postpone each date. In April 2015, the City stated as a ground for delay its inability to access amphibian breeding census data cited by the East Bay Regional Park District in their CEQA comment letter. However this data had been available to the City as of at least December 2014 as part of the Amphibian Monitoring Report (dated Dec. 19, 2014) prepared by McBain Assoc / URS. At this time there is no set date for the appeal hearing to take place.

II. BACKGROUND ON CEQA.

CEQA’s fundamental policy is that all public agencies “shall regulate such activities so that major consideration is given to preventing environmental damage.” *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 390; Pub. Res. Code § 21000(g.) CEQA defines a "significant effect" as a "substantial, or potentially substantial, adverse change." Pub. Res. Code § 21068. This means that an activity has a significant effect if it "has the potential to degrade the quality of the environment." *Azusa Land Reclamation Company, Inc. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal. App. 4th 1165, 1192.

CEQA applies to discretionary activities undertaken by a public agency. Pub. Res. Code § 21080. If an initial study demonstrates that the project will not have a significant effect on the environment, the agency makes a "negative declaration" to that effect. Pub. Res. Code § 21080(c.) If the "Initial Study" determines that the project *may* have a significant effect, an Environmental Impact Report ("EIR") is required. Pub. Res. Code § 21151. An EIR is intended to serve as "an environmental full disclosure statement." *Rural Land Owners Assn. v. City Council of Lodi* (1983) 143 Cal. App.3d 1013, 1020. EIRs demonstrate to an apprehensive citizenry that the agency has analyzed and considered the ecological implications of its action. *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 86.

CEQA requires the EIR to identify and adopt feasible mitigation measures which may substantially reduce or avoid the project's significant adverse impacts. *See Laurel Heights, supra*, 47 Cal.3d at 400-403; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564; Pub. Res. Code §§ 21002, 21002.1. This analysis of feasible mitigation measures and a reasonable range of alternatives is crucial to CEQA's substantive mandate that significant environmental damage be substantially lessened or avoided where feasible. Pub. Res. Code §§ 21002, 21081; 14 Cal. Code Regs. §§ 15002(a)(2) and (3). *Laurel Heights, supra*, 47 Cal.3d at 392, 404-405. CEQA requires government agencies to disclose to the public the reasons why they have approved a particular project resulting in significant environmental effects. 14 Cal. Code Regs. § 15002(a)(4). "The EIR process protects not only the environment but also informed self-government." *Laurel Heights, supra*, 47 Cal.3d at 392.

Finally, CEQA requires agencies to disclose to the public the reasons why they have approved a particular project resulting in significant environmental effects through the adoption of a statement of overriding considerations. See Pub. Res. Code § 21081(b); 14 Cal. Code Regs. § 15021(d). This statement acts as a moment of accountability between the agency and the public and cannot be avoided where a project is approved with significant impacts on the environment. *See Communities For a Better Environment, supra* 103 Cal. App. 4th at 124-125 ("[R]esponsible public officials must still go on the record and explain specifically why they are approving the later project despite its significant unavoidable impacts.")

III. COMMENTS

A. The Record Contains Substantial Evidence Supporting a Fair Argument that the Impacts of the Project on Foothill yellow-legged and California red-legged frogs are Potentially Significant thereby Necessitating the Preparation of an EIR.

CEQA requires the lead agency to prepare an EIR for the project where substantial evidence is presented supporting a fair argument of potentially significant impacts occurring from the project. *Pocket Protectors v. City of Sacramento* (2004) 124 Cal. App. 4th 903, 926-928, states the standard for judicial review of an agency's decision not to prepare an EIR:

A public agency must prepare an EIR whenever substantial evidence supports a fair argument that a proposed project 'may have a significant effect on the environment.' (§§ 21100, 21151, 21080, 21082.2.....If there is substantial evidence in the whole record supporting a fair argument that a project may have a significant non-mitigable effect on the environment, the lead agency shall prepare an EIR, even though it may also be presented with other substantial evidence that the project will not have a significant effect. (§ 21151, subd. (a);) ...The fair argument standard is a "low threshold" test for requiring the preparation of an EIR...It is a question of law, not fact, whether a fair argument exists, and the courts owe no deference to the lead agency's determination. Review is de novo, with a preference for resolving doubts in favor of environmental review.

Here, the public comments on the PMND demonstrate the potential for the project to have significant impacts to frog species in a number of ways, as discussed below.

1. Adverse Modification of Key Breeding Habitat for Frogs.

The PMND states that the Project will include substantial alteration to the Little Yosemite streambed area, including the construction of “concrete weirs shaped like natural boulders or bedrock in three strategically located water features. Select boulders would also be cut or removed and some holes, or slots through large boulders, may be filled with concrete to stabilize landing pools at the tops of waterfalls along the fish migration path.” See PMND, p. 1.

According to the PMND, these alterations are intended to benefit a future run of anadromous steelhead, which as this point in time does not exist in the watershed. However, the PMND does not address in any meaningful way how such changes will affect existing frog species except to claim that the alterations will maintain habitat:

Temporary and permanent impacts on California red-legged frog, Foothill yellow-legged frog, and western pond turtle and their aquatic habitat would result from installation of the concrete weirs within Alameda Creek. Project construction would temporarily dewater portions of the stream channel that could be used for movement of these species within waters of Alameda Creek. ...Following construction, all areas of temporary disturbance would be restored to pre-project conditions allowing species movement through the creek channel waters. Deeper pools resulting from the installation of the concrete weirs within the creek could be used by California red-legged frog, Foothill yellow-legged frog, and western pond turtle for foraging or refuge from predators which would still constitute suitable habitat for these species. *Therefore, post-project conditions within Alameda Creek are not expected to prohibit the movement of wildlife species within the creek channel or result in decreased habitat conditions, and impacts on these species would be less than significant.*

See PMND, p. 129 (emphasis added.)

The evidence submitted by SAVE THE FROGS, Alameda Creek Alliance, East Bay Regional Parks and the California Department of Fish and Wildlife (“DFW”) demonstrate, however, that the changes to pool habitat envisioned by the Project have the potential to harm native amphibians in a number of ways, including:

- Creating impervious surface areas by pouring concrete in pools represents permanent loss of suitable amphibian rearing habitat because larvae rely on interstitial spaces in coarse sediment as refugia when flows fluctuate and velocities increase (Kupferberg *et al* 2011). Post-metamorphic amphibians also rely on interstices to avoid predation.

- Plugging of holes between boulders with concrete represents loss of habitat for juvenile and adult frogs. Crevices and moist cavernous spaces among large rocks provide refuge for amphibians from predators as well as refugia from extreme heat and drying during the summer and fall low flow seasons.

- Creation of deep water pools and change in stream gradients could allow or further the spread of predators and pathogens of native frog species. These include the signal crayfish, which have been shown to occur approximately 500 feet downstream of the Little Yosemite reach. Natural gradient barriers have been shown to limit the upstream dispersal of signal crayfish in regulated rivers but the Project removes such barriers, placing upstream populations of all amphibians at further risk. Further, American bullfrogs are known to be common in the lower reaches of Alameda Creek, but not prevalent in Little Yosemite due to the steeper gradients and fast flows. The pool deepening improves conditions for the bullfrogs, which are known predators of native frog species and compete with native frogs for breeding habitat, as well as potentially furthering the spread of chytrid fungus (*Batrachochytrium dendrobatidis*) a pathogen that has driven numerous amphibian species throughout the world to complete extinction. Bullfrogs are widely recognized as vectors of the chytrid fungus.

As discussed below, the PMND does not acknowledge that the Little Yosemite area functions as a critical breeding area for Foothill yellow-legged frogs, offering the only spot in the area 1) with adequate water during the summer months for frog tadpoles to mature; and 2) lacking permanent populations of crayfish and bullfrogs which are more common in the downstream reaches of Alameda Creek. The elimination of this breeding site would be a significant impact that has not been analyzed in the PMND.

Each of these points, raised and discussed in more detail in the comment letters, raise a ‘fair argument’ that the Project, intended to enhance habitat for non-existent anadromous steelhead, could have significant adverse impacts on the native frogs that already occur there.

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2. Potential Spread of Chytrid Fungus Due to Relocation Plans.

The PMND proposes as a mitigation measure the relocation of amphibians prior to the de-watering of the pools during construction. *See* PMND, p. 130, Mitigation Measure M1-BI-4 (“Rescued fish and amphibians shall be relocated to nearby suitable habitat that has been agreed to with the regulatory agencies.”) In its DFW Lake and Streambed Alteration Agreement application, the City has proposed that relocations would be made to bullfrog-free areas, thereby requiring the native amphibians to be moved approximately two miles upstream to avoid the reach, which dries each summer.

As the comment letters on the Project, along with a subsequent letter sent by Sarah Kupferberg to the City on May 20, 2015 (“May 20 Letter”), demonstrate, however, the relocation of frogs and larvae due to construction activities has the potential of spreading the chytrid fungus, a harmful pathogen that occurs in the Little Yosemite Reach, but may not occur upstream from the Project area. The PMND contains no analysis whatsoever about the possible impacts of spreading chytrid fungus further upstream into reaches where the pathogen may not yet pose a threat to existing frog populations.

The spread of chytrid fungus due to the upstream relocation of frogs would be a significant impact to these species and the entire upstream reach of Alameda Creek.

3. Cumulative Impacts on Frogs in the Area is Potentially Significant.

CEQA requires the City to consider "past, present, and probable future projects producing related or cumulative impacts." 14 Cal. Code Reg. § 15130 (b)(1)(A). 14 Cal. Code Reg. § 15065(c.) 14 Cal. Code Reg. § 15355(b) 14 Cal. Code Reg. § 15130(b)(1)(B)(3). CEQA mandates ". . . that environmental considerations do not become submerged by chopping a large project into many little ones -- each with a minimal potential impact on the environment -- which cumulatively may have disastrous consequences." *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283-284.

CEQA requires a mandatory finding of significance for a project with "possible environmental effects which are individually limited but cumulatively considerable." "Cumulatively considerable" means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects." 14 Cal. Code Reg. § 15065(c.) The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time. 14 Cal. Code Reg. § 15355(b). Furthermore, CEQA requires the City to define the geographic scope of the area affected by the cumulative effect and provide a reasonable explanation for the geographic limitation used. 14 Cal. Code Reg. § 15130(b)(1)(B)(3).

Here, the PMND addresses potential cumulative impacts to native frog species by listing projects in Table 3, and then concluding the following:

Projects such as the Alameda Creek Diversion Dam Fish Passage, Alameda Creek Fish Passage and Water Supply Reliability Improvement Projects, Arroyo Mocho Stanley Reach Restoration Project, PG&E Gas Pipeline Crossing, and Zone 7 Water Agency Stream Management Master Plan Improvements would include elements tailored to improving the Alameda Creek watershed to facilitate fish passage and restore steelhead to the creek, which would *result in a cumulative benefit to biological resources*. Restoration elements would be required conditions of these projects for affected special status species habitat either in the project area of disturbance or on mitigation lands within the watershed as relevant compensation for local special-status plants, invertebrates, amphibians, reptiles, birds, and mammals.*Operational impacts of the Little Yosemite Fish Passage Project would be cumulatively beneficial to local aquatic species due to the expected outcome of the project removal of physical barriers to steelhead passage and the creation of deeper pools to encourage spawning. These features in turn would be beneficial to local fish and amphibians (e.g., California red-legged frog and Foothill yellow-legged frog) that already use Alameda Creek for foraging and breeding.*

PMND, p. 134 (emphasis added.)

This conclusion is flawed for three reasons.

First, as discussed, the operational impacts of Little Yosemite Fish Passage Project will likely be negative for native frog species due to the changes proposed for key habitat in the Little Yosemite reach, which will likely improve habitat for non-native predators at the expense of native frogs, and will create the potential for spread of chytrid fungus, an issue wholly unanalyzed in the PMND.

Second, the PMND provides no explanation for how the listed projects ‘tailored to improving the Alameda Creek watershed to facilitate fish passage and restore steelhead to the creek’ would result in a cumulative benefit to native frogs. The simplistic assumption that more water running down Alameda Creek during medium and high flow periods will benefit amphibians is unsupported and unanalyzed. In fact, the reports prepared for the SFPUC by its own consultants demonstrate that the changes in flow regime from the diversion dam to the confluence will provide no concrete benefit to amphibians, as such changes will not increase the availability of water in the summer for breeding habitat for native frog species. *See Alameda Creek and Arroyo Hondo Foothill Yellow-legged Frog Baseline Assessment and Future Monitoring Recommendations*, McBain Assoc., December 19, 2014, p. 18 (“The ephemeral reach between ACDD and the top of Little Yosemite is unlikely to become productive habitat in terms of producing young-of-the-year frogs. Flow simulations indicate that the proposed future diversion schedule, while increasing the duration of wetted channel above the computed impaired levels, will likely be insufficient with respect to the amount of time needed in the summer for

tadpoles to reach metamorphosis.”)

Third, the PMND’s cumulative impact analysis with respect to Foothill yellow-legged frogs does not address the adverse impacts of the Calaveras Dam Replacement Project (CDRP) including 1) the loss of almost two miles of stream habitat above the reservoir in Arroyo Grande; and 2) the change in outflows from the reservoir intended to benefit anadromous fish that will create cold water conditions below the confluence of Calaveras and Alameda Creek that are below the thermal niche of the warm-water adapted native herpetofauna.

The EIR prepared for the CDRP does not explain or analyze how these cumulative adverse impacts will be avoided, but instead simply relies on mitigation measure 5.4.3, which requires the City to document how flow changes will benefit Foothill-yellow-legged frogs:

Document that project benefits to Foothill yellow-legged frog habitat in Alameda Creek from the ACDD to the Calaveras Creek confluence fully compensate for any loss of Foothill yellow legged frog at the ACDD and for the loss of approximately 9,421 linear feet (approximately 1.8 miles) of habitat in Arroyo Hondo, fully compensate for 0.03 acre of aquatic habitat at the ACDD, and for any loss of breeding habitat in Alameda Creek downstream of the confluence with Calaveras Creek that may result from a potentially increased bullfrog population through monitoring and adaptive management within 5 years of the start of bypass flows at the ACDD.

CDPR EIR, p. 5-11 - 5-11a.

Nothing in the PMND explains how the significant impacts to yellow-legged frog habitat have been avoided by measure 5.4.3 or any new flow regime that might be carried out in the future to benefit trout or steelhead. Thus, there is no basis for the PMND not to analyze the cumulative effects of this Project in combination with the adverse effects to Foothill yellow-legged frogs of 1) losing additional habitat in the watershed; and 2) having the stream flow regimes modified downstream of the confluence in a harmful manner. The evidence shows that Foothill yellow-legged frogs are imperiled in the region, existing only in the Alameda Creek watershed, and are under existing stresses due to drought, non-native invasive predators associated with SFPUC's reservoirs and the chytrid fungus. The further loss and/or deterioration of habitat for this species caused by the CDRP, in combination with the potential adverse changes caused by this Project, will likely have significant impacts on the species, which must be analyzed as part of an EIR under CEQA.

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B. The PMND's CEQA Analysis With Respect to Impacts on Frogs is Inadequate.

The CEQA review process should result in "an informational document" whose purpose "is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project." Pub. Res. Code § 21061; 14 Cal. Code Reg. § 15003(b)-(e). *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391. A failure to include adequate information in the CEQA review document constitutes a failure to proceed in the manner required by law, and is therefore reviewed without deference to the agency's determination. *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

Here, the PMND fails as an adequate informational document under CEQA.

1. The PMND Fails to Describe Adequately the Environmental Setting Regarding Impacts to the Foothill Yellow-Legged Frog.

An EIR must adequately describe the environmental setting where the project is located. *San Joaquin Raptor v. County of Stanislaus* (1994) 27 Cal. App. 4th 713, 722-723.

Here, the PMND provides no little to no environmental setting information regarding the current status and habitat needs of the Foothill yellow-legged frog, which failure provides the basis for the PMND's overall lack of analysis regarding the Project's impacts on this species.

First, the PMND provides no information about the current imperiled status of the species in the area. As discussed in the CDPR EIR, the Foothill yellow-legged frog has been extirpated throughout most of Alameda and Contra Costa counties with surviving populations restricted to several drainages within the Alameda Creek watershed. In this context, the loss of further breeding populations could have disastrous effects for the stability of the population in the watershed, as the species thereby becomes more susceptible to disappearing from the area as a result of stochastic events such as disease outbreaks or natural disasters. As discussed above and below, this failure is further exacerbated by the PMND's failure to identify the range of cumulative effects this species is, or will be undergoing, as a result of the CDPR and the City's unanalyzed push towards remaking the local creek habitat more favorable to anadromous fish.

Second, the PMND's discussion fails to acknowledge the known presence of Foothill yellow-legged frogs in the Little Yosemite reach based on longtime monitoring done by the EBRPD and SFPUC, instead stating only that its presence is 'likely' in the Project reach. Given that the City's prior CEQA reviews have documented this species in Little Yosemite, *see* CDPR EIR, p. 4.4.-43, Figure 4.4.8, it is legal error for the PMND not to have assessed the condition of the current population as a baseline for its impact analysis.

This error is illustrated by the PMND's failure to assess the Little Yosemite reach as not only an area where Foothill yellow-legged frogs are present, but also as *high quality and potentially critical breeding habitat* due to 1) the presence of late summer water in an open sunny area that allows tadpoles to mature and successfully undergo metamorphosis; and 2) the absence of invasive non-native predators bullfrogs and crayfish. The May 20 Letter states:

During the spring of 2014 East Bay Regional Park District noted on 4/2 there was one clutch of eggs at the site and it was marked with a stick and flagging and labeled. The clutch had hatched by 4/14, and tadpoles were present, and on 4/30 a second clutch was marked in the pool, and by its age it would have likely been present on 4/25. At least two adult male frogs had calling territories in the pool and were readily seen by trained observers. That three different life stages verified as being present in the pool, were missed on 4/25/14 by the field reconnaissance biologists undermines our confidence that Mitigation Measure M-BI-4 Amphibian Exclusion, Rescue and Removal, which requires finding animals, could be carried out effectively.

The PMND provides no information about how the Little Yosemite pool complex possesses this unusual combination and thus offers the only quality reproductive habitat for frogs in the area. The PMD's failure to acknowledge the potential impact of losing this important breeding habitat to Foothill yellow-legged frogs in the area does not meet the informational standards of CEQA. *See Friends of the Eel v. Sonoma County Water Agency* (2003) 108 Cal. App. 4th 859, 874 (environmental setting ensures that the agency's "analysis of significant effects, which is generated from this description of the environmental context, is as accurate as possible.")

2. The PMD Does Not Assess the Impacts of this Project in the Proper Cumulative Context.

CEQA requires the agency to define the "project" broadly as the whole of an action, which has a potential for resulting in a physical change in the environment, directly or ultimately. 14 Cal. Code Reg. §§ 15002(d); 15378(a). "The term 'project' refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term 'project' does not mean each separate governmental approval." 14 Cal. Code Reg. § 15378(c)-(d).

The PMND does not analyze impacts in the proper cumulative context. Here, the SFPUC is taking a number of actions in the area relating to the replacement of the Calaveras Dam that are designed to improve conditions for a future run of anadromous steelhead in Alameda Creek, even though that species does not currently exist there. Yet, as discussed above, at no time does the PMND address the cumulative effects of this overarching new policy direction to give preference to improving future habitat for fish at the expense of native amphibians that occur in Alameda Creek. These include:

- modifying flows between Calaveras Creek confluence and Welch Creek confluence

that will make water temperatures 5 °C cooler than at present during the summer, creating future conditions that will be below thresholds for tadpole growth;

- allowing for higher winter and spring flows below the Alameda Creek Diversion Dam that have been shown *not* to increase the amount of summer habitat in Alameda Creek critical to successful reproduction;

- causing a complete loss of one year's cohort of young of the year frogs due to construction impacts) research shows that the loss of breeding in particular years may have significant consequences to the population. (For example, the population downstream of the Calaveras Creek Confluence has taken 10 years to recover from the previous loss of cohorts that occurred in 2005 and 2006 due to a seasonally high volume flow releases from the Reservoir. Not until in 2014 and 2015 has the density of breeding frog returned to the 2003-2004 levels pre perturbation levels);

- and the potential permanent loss of critical breeding habitat in Little Yosemite due to pool modification impacts, as discussed above;

- proposed mitigation and minimization measures that will spread chytrid fungus and place native frog species at risk;

- construction of a fish ladder at the ACDD, causing further habitat loss and permanent destruction of another breeding site documented by SFPUC's consultants and staff biologists; and

- proposed in stream flows downstream of Calaveras Creek that will minimize the availability area of suitable depth and velocity habitat. Direct habitat mapping of in-stream usable area shows that proposed future flow releases from Calaveras Reservoir will significantly reduce the area in the creek with the depths, velocities, and substrates required by Foothill yellow-legged and California red-legged frogs *See Alameda Watershed Habitat Conservation Plan, Chapter 4, Impact Analysis, December 12, 2014, Figures 4.C and 4.F ; p. 4-31* (during red-legged frogs' breeding season "there is an approximate *seven-fold decrease in habitat*" based on the projected winter and spring stream flows in normal and wet years); p. 4-38: (for Foothill yellow-legged frogs the "future spring breeding season base flows in the Conservation Strategy scenario coincide with the *minimum area of suitable habitat*".) (emphases added.)

These impacts must be considered in the broader context of changes made to the Calaveras dam and reservoir operation that will eliminate considerable native frog habitat at and upstream from the reservoir, and the SFPUC's lack of any plan to take action to benefit these species such as a concentrated program to eliminate or control the non-native predators and competitors and disease vectors in the reach (i.e. bullfrogs, crayfish, bass, chytrid fungus). Despite the promises of the CDRP EIR, there has been *no plan formulated* for how SFPUC will "fully compensate" for loss of native frog habitat, as required by mitigation measure 5.4.3. Indeed, at least one possible amphibian habitat enhancement action, creating gaps in canopy

cover, has been opposed by NMFS. (See Notes from April 21, 2015 Little Yosemite Fish Passage Permitting meeting, stating in item 3d that “NMFS could have concerns about reducing shade over the creek and potentially increasing the temperature in the stream.”)

The PMND is flawed for failing to consider this cumulative context, which shows a distinct policy move on the part of SFPUC towards creating future habitat for fish passage, spawning, and rearing, without any meaningful consideration of the incremental impacts occurring to native frog species with every action taken. See e.g., *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 117 (“guiding criterion . . . is whether any additional effect caused by the proposed project should be considered significant given the existing cumulative effect.”); *Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal. App 4th 1019, 1026 (additional increase in noise level of 2.8 to 3.3 dBA was significant given that existing noise level of 72 dBA already exceeded recommended maximum of 70 dBA.); *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 718 (relevant question is “whether any additional amount of precursor emissions should be considered significant in light of the serious nature of the ozone problems in this air basin.”)

3. The Mitigation is either Harmful to Frogs or is Improperly Deferred.

The mitigation measures for the Project generally fall within two categories.

First, for construction impacts the PMND proposes to capture and relocate native frogs that occur in the Little Yosemite Reach. As discussed above, and in other comments received from the public, such capture and relocation will 1) likely lead to the spread of chytrid fungus in the watershed, a significant impact that has not been addressed; 2) stress chytrid-infected animals by handling and transport; and 2) not avoid impacts to that year’s breeding cycle, as the PMND provides no standards or guidance for how workers could hope to relocate eggs and tadpoles successfully. The PMND contains no criteria or guidance for how relocation could hope to be successful and/or not cause even worse impacts.

Second, to address permanent impacts, the PMND proposes the creation of a habitat restoration plan (“HRP”). However, the HRP contains no standards that would ensure that habitat in the Little Yosemite area would be restored to the high quality breeding habitat it now offers to native frog species. Instead, the relevant details of the plan would be worked out in the future, and, presumably, would have to be consistent with the potentially contradictory depth, velocity, and substrate parameters required to maintain frog habitat and establish a successful run for a future, but not yet existing, run of anadromous steelhead. This approach does not meet CEQA standards.

A CEQA review document is inadequate if “[t]he success or failure of mitigation efforts . . . may largely depend upon management plans that have not yet been formulated, and have not been subject to analysis and review” within the CEQA process. *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 92. See also *POET, LLC v. Cal.*

Air Resources Board (2013) 217 Cal.App.4th 1214, 1269 ("We conclude that ARB's statement that its future rulemaking will 'establish specifications to ensure there is no increase in NOx' suffers from the same defect as the net-zero standard for greenhouse gas emissions adopted in CBE – it established no objective performance criteria for measuring whether the stated goal will be achieved."); *Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d 296, 309-311 (Agency may not defer the development of mitigation in lieu of collecting the information necessary to assess the accompanying impacts.); *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1119 (rejecting mitigation as inadequate where "we conclude that here the County has not committed itself to a specific performance standard" but "has committed itself to a specific mitigation goal – the replacement of water lost by neighboring landowners because of mine operations.")

The mitigation for this Project suffers from the same flaws as the PMND's impact analysis, in that it 1) fails to acknowledge the unique high quality habitat offered to native frog species by the Little Yosemite reach, especially during drought years; and 2) assumes that modifications designed to improve habitat for fish will also be beneficial to native amphibians. No evidence to support the assumption is provided. Here, nothing set forth in the PMND's mitigation measures will avoid the significant impacts to native frogs in this area that will be caused by the Project.

C. The City's CEQA Procedure is Contrary to Law.

The City's CEQA procedure in this case is contrary to CEQA law. Here, the City Planning Department's 'Notice of Availability of and Intent to Adopt a Mitigated Negative Declaration' states that the Planning Department has already made a determination "that the proposed project could not have a significant adverse effect on the environment." Accordingly, the City's procedure requires a party challenging that determination to file an appeal of the City's decision. *See* Notice of Availability, p. 2 ("In the absence of an appeal, the mitigated negative declaration shall be made final, subject to necessary modifications, after 30 days from the date of publication of the PMND.")

This procedure violates CEQA in at least two respects.

First, the City's procedure purports to allow the Planning Department to make a final determination with regard to CEQA compliance without first circulating the relevant CEQA document for public review and comment, and thereafter considering that comment in making its final decision. The fact that the City characterizes the PMND in this case as 'preliminary' is simply a cosmetic feature, for the Planning Department's determination is still considered 'final' for purposes of its jurisdiction over the administrative process.

Second, the City's procedure essentially requires members of the public to pay a fee – in this case the \$521 appeal fee – in order to exercise its statutory right to submit substantial evidence supporting a fair argument that a project may have a significant effect on the

environment, thereby necessitating the preparation of an EIR. *See Pocket Protectors v. City of Sacramento* (2004) 124 Cal. App. 4th 903, 926-928.

In this case, based on the direction of the City, SAVE THE FROGS submitted an appeal, along with the \$521 fee on December 15, 2014. Given that the City's charge of this fee was illegal, SAVE THE FROGS therefore formally requests the City, within 30 days of this letter, to either 1) refund this fee paid immediately to SAVE THE FROGS; or 2) provide SAVE THE FROGS an explanation for why this fee is justified and why the City is not required to refund it.

D. The Current Status Quo is Contrary to the City Code.

The City Code states that, following an appeal, the "Planning Commission shall schedule a public hearing on any such appeal within not less than 14 nor more than 30 days after the close of the appeal period." *See City Code § SEC. 31.11(f)*. As of this date, there is still no scheduled hearing date for the appeal filed by SAVE THE FROGS on December 15, 2014, even though at this point it has been over *eight months since the close of the appeal period*.

IV. CONCLUSION

The facts in this case demonstrate that the SFPUC is proceeding down a path to establish a run of anadromous steelhead in Alameda Creek without analysis or meaningful consideration of the impacts of its actions on native amphibian species that, in contrast to the steelhead runs envisioned for the future, actually *still exist* in the area.

The evidence from the most recent monitoring shows that the Little Yosemite reach of Alameda Creek is a critical breeding area for native frog species in this area, particularly the Foothill yellow-legged frog, which relies on this watershed as a last anchor of population stability in the county. The Little Yosemite reach is a critical habitat corridor connecting frog populations in the upper watershed, where hydrologic alteration by dams is absent to moderate, to the reach below Calaveras Dam where hydrologic alteration can cause inhospitable flow conditions for frogs. Evidence shows that Foothill yellow-legged frog breeding was suppressed for several years in the reach below Calaveras following sustained spring releases at greater than 100cfs from the Reservoir. Since 2006, however, a slow re-colonization has occurred, proceeding spatially in annual increments from Little Yosemite in a downstream direction, making this reach a critical 'source' habitat for the Foothill yellow-legged frog population still surviving in Alameda Creek.

The PMND does not seriously address the potential loss of this habitat as part of its impact analysis. Of equal concern, the PMND provides no analysis of the greater cumulative impacts on native frog species of this and other projects currently being implemented by SFPUC to fulfill its obligations as part of the CDRP.

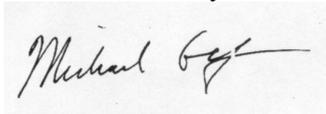
Finally, as discussed, the City's procedure in this case is contrary to CEQA.

To comply with the law, the City must 1) rescind the PMND; 2) refund the appeal fee improperly charged to SAVE THE FROGS; and 3) commence the preparation of a full EIR for this Project, which takes into account the cumulative effects of the SFPUC's many actions that are likely to harm native frog species in the Alameda Creek watershed. In our view, each of these actions are legally required at this juncture.

As a matter of broader policy, SAVE THE FROGS in fact questions the current policy apparently being pursued by SFPUC – as epitomized by this Project – to purposely change the habitat of Alameda Creek to favor a future run of anadromous steelhead which currently does not exist in the watershed over an assemblage of native amphibians – several of which are equally imperiled – that rely on this habitat as critical for long term survival in the region.

In our view, the current regulatory back and forth involving SFPUC's efforts to establish a steelhead salmon run as part of the Calaveras Dam Replacement Project has led to a disjointed and segmented environmental review process myopically focused on creating hypothetically favorable conditions for steelhead where they do not currently exist. Yet in the meantime, the species that *do* live in this watershed are struggling. A more precautionary – and more *reasonable* – approach would be to wait on the type of direct habitat modifications proposed by this Project *until* such time as the downstream problems and migration barriers are fixed, at which point, when steelhead ultimately arrive at the site, the predictions that Little Yosemite is not passable can be validated by the ultimate arbiters, the fish themselves. Until then, we see no reason to degrade critical amphibian habitat in Little Yosemite when the need for the Project cannot be confirmed and alternatives have not yet been evaluated under CEQA.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Graf", is centered on a light gray rectangular background.

Michael W. Graf
on behalf of SAVE THE FROGS